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VIA ELECTRONIC FILING

Hon. Kevin J. Martin, Chairman
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

Re: *IP-Enabled Services Rulemaking*, WC Docket No. 04-36

Dear Mr. Chairman:

On behalf of Vonage Holdings Corp. ("Vonage"), I am writing to provide you with additional information concerning the Commission's legal authority to require incumbent local exchange carriers ("ILECs"), and others involved in the operation of the nation's 9-1-1 infrastructure (collectively "9-1-1 operators"[1]), to provide Vonage (and other voice over Internet protocol ("VoIP") service providers) with access to that infrastructure.

As is discussed in Section II below -- **this Commission has expressly recognized that the fact that most 9-1-1 calls take place within a single state's border posed no obstacle to its jurisdictional authority.[2] Furthermore, as discussed below, the regulatory classification of Vonage has no bearing on this Commission's authority to require ILECs to offer it direct 9-1-1 access.[3]**

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[1] In practice, 9-1-1 operators today are almost exclusively incumbent LECs, because these entities (except in Rhode Island) control the selective routers and other equipment that directs emergency calls to the correct PSAP and the Automatic Location Information (ALI) databases that deliver caller identifying information to the PSAP. The ILECs, in turn, charge the PSAPs for use of these facilities. However, Vonage urges that any rules adopted by the Commission apply to all 9-1-1 operators, regardless of whether they are incumbent LECs, to avoid any possibility of future loopholes if these facilities were to be transferred to different entities.

[2] *See infra* Section II.A*; See also Revision of the Commission's Rules to Ensure Compatibility With Enhanced 911 Emergency Calling Systems*, Notice of Proposed Rulemaking, 9 FCC Rcd 6170 (1994), ¶ 59 ("*1994 9-1-1 NPRM*"); *see also The Use of N11 Codes and other Abbreviated Dialing Arrangements*, First Report and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 5572, ¶ 58 (1997) (recognizing that although most "individual [9]11 calls are likely to be intrastate … 911 ha[s] significance that go[es] beyond state boundaries") (punctuation in original altered).

[3] *See infra*. Section II.C.

As Vonage has explained in previous meetings, Vonage seeks to obtain the means necessary to route its customers' 9-1-1 calls directly to public safety answering points ("PSAPs") operated by state and local governments and transmit automatic location information ("ALI") and automatic number information ("ANI") directly to PSAP operator work stations. In other words, Vonage is striving to provide an Emergency 9-1-1 ("E9-1-1") calling service that is the functional equivalent of that provided by wireline local exchange carriers and commercial mobile radio service ("CMRS") providers. To do so, Vonage simply requires the same 9-1-1 access rights and capabilities (such as pseudo-ANI codes and ALI steering) that CMRS providers currently enjoy.[4] As explained below, it is both within the Commission's authority and consistent with its precedents to require common carriers to offer such access.

I. Policy Considerations Warrant Mandating VoIP 9-1-1 Access

A. Health and Safety Considerations

As an initial matter, there is no question that all relevant policy considerations favor a rule requiring access to the 9-1-1 elements. First, health and safety considerations alone warrant this Commission action. The one million or so VoIP customers in the United States today who chosen VoIP service providers do not deserve inferior access to, and responses from, emergency services simply as a consequence of that choice. Indeed, as explained in section II.A, below, the Commission relied largely on the "health and safety" provisions of Title I of the Communications Act as the basis for imposing 9-1-1 obligations before it had any supplementary statutory authority upon which it could rely.

B. Competitive Considerations

Competitive considerations also warrant 9-1-1 access rights for VoIP providers. This should incude access to *all of the elements – not just some. The* 9-1-1 operators have provided no reasonable justification to withhold 9-1-1 access and there is none. There is no significant technical obstacle, and VoIP 9-1-1 access poses little inconvenience or expense; and to the extent it does, the benefit to the public greatly outweighs any such burden. The 9-1-1 operators, of course, can charge non-discriminatory rates to recover any costs they incur in providing access. It therefore seems plain that the incumbent LECs that are the primary operators of our nation's 9-1-1 infrastructure have been unwilling, to date, to provide VoIP providers with 9-1-1 access because it gives them a competitive advantage.[5]

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[4] *See Ex Parte* Letter from William B. Wilhelm Jr., Counsel for Vonage Holdings Corp., to Hon. Kevin J. Martin, Chairman, Federal Communications Commission, WC Docket No. 04-36 (filed May 9, 2005). *See also Ex Parte* Letter from William B. Wilhelm Jr., Counsel for Vonage Holdings Corp., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 04-36 (filed May 5, 2005).

[5] Indeed, in their recent merger application, AT&T and SBC identified independent VoIP providers as one of the principal emerging competitive presences in the market. *See Joint Application of SBC Communications Inc. and AT&T Corp. for Approval of a Transfer of Control*, Description of the Transaction, Public Interest Showing and Related Documentation WC Docket No. 05-65 (filed by the

In this regard, the 9-1-1 infrastructure must be viewed as an "essential facility" that cannot be duplicated by VoIP competitors.[6] Well established antitrust principles suggest that VoIP providers should have access. All of the elements of an "essential facilities" cause of action under the Sherman Act exist:[7] (1) the ILECs control access to, and in all but a few cases actually operate, this essential infrastructure; (2) the ILECs can cite no reasonable technical ground or legitimate "profit maximizing incentive" for denying VoIP competitors access (other than an anticompetitive desire to harm them); and (3) the ILECs currently permit all kinds of other competitors (CLECs, CMRS providers and PBX operators, to name a few) access to various (and different) elements of the 9-1-1 infrastructure.[8]

The Commission has consistently recognized its duty to factor such competition-related considerations into the rule-making process. As the D.C. Circuit has explained, although the Commission "is not charged with enforcement of the antitrust laws," it must "seriously consider[] the antitrust consequences of conduct within its regulatory jurisdiction" as a component of evaluating the scrutinized conduct's "effect[] on the public interest."[9] Thus, for example, the Commission has recognized that utility poles constitute "essential facilities," access

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Joint Applicants Feb. 21, 2005) at 60-63. It is, thus, not surprising that incumbent carriers would seek to delay full competitive market entry by VoIP providers for as long as possible.

[6] To be clear, the 9-1-1 infrastructure (*i.e.*, the selective router and the trunks connecting the PSAPs to the selective router) is literally a "bottleneck" because the PSAPs' equipment has been designed to receive calls solely from the selective router and from no other source.

[7] A long line of cases dating back to *United States v. Terminal Railroad Ass'n*, 224 U.S. 383 (1912), has held that operators of bottleneck facilities with market power may be required, under certain circumstances, to provide access to competitors. *See Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 483 n.32 (1992) ("as a general matter a firm can refuse to deal with its competitors. But such a right is not absolute; it exists only if there are legitimate competitive reasons for the refusal."); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 (1985); *Lorain Journal Co. v. United States*, 342 U.S. 143, 155 (1951) (right to refuse to deal is "neither absolute nor exempt from regulation"); *MCI Communications v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1132-33 (7th Cir. 1983) (requiring monopolist telecommunications provider to provide access to its local service network to competitors in long-distance services); *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992-93 (D.C. Cir. 1977) (requiring entity controlling stadium to provide access on reasonable terms to owners of sporting teams that need to use such bottleneck assets); *CTC Communications Corp. v. Bell Atlantic Corp.*, 77 F. Supp. 2d 124, 147 (D. Me. 1999); *Data General Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1183-84 (1st Cir. 1994). The Supreme Court's recent decision in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 124 S.Ct. 872, 880-81 (2004), expressly acknowledged the continuing validity of this line of cases.

[8] *See Ex Parte* Letter from William B. Wilhelm, Jr., Counsel for Vonage Holdings Corp., to Hon. Kevin J. Martin, Chairman, Federal Communications Commission, WC Docket No. 04-36 at 6-7 & nn.11-12 (filed May 9, 2005).

[9] *Equipment Distributors' Coalition, Inc. v. FCC*, 824 F.2d 1197, 1201 (D.C. Cir. 1987) (quoting *United States v. FCC*, 652 F.2d 72, 88 (D.C.Cir.1980) (en banc)).

to which must provided to third parties.[10] And the Commission has acted to restrain the power of foreign carriers to leverage their in-country monopolies over U.S. carriers seeking interconnection.[11] Indeed, Commission action has been reversed by appellate courts for failing to consider the impact of antitrust-related considerations on the public interest.[12]

C. Need to Assure National Uniformity

As the Commission is aware, Vonage is the industry leader in developing VoIP 9-1-1 solutions and is committed to the development of a VoIP E-9-1-1 that is every bit as robust and feature-laden as that offered on the PSTN. As such, in 2003 it was a signatory to NENA's Statement of Principles with respect to the development of VoIP 9-1-1, which recognized the current practice of routing 9-1-1 calls to PSAP administrative numbers was an interim step along the way to developing more robust capabilities. But Vonage also agrees with NENA's publicly voiced opposition to "the fragmentation of 911" and agrees "that consumer expectations for 911 are national and therefore require jurisdictional leadership and resources from the Federal Government."[13] In its *IP Service NPRM*, the FCC stated that it would provide that leadership, indicating its intent to preempt the disparate state approaches that Vonage and NENA have advocated against. Prompt Commission action is thus necessary to assure that potentially conflicting state VoIP 9-1-1 obligations, which are beginning to proliferate around the country, do not undercut the national uniformity in this area that the Commission has long recognized is important. Attached hereto as Appendix A is a summary of legislation currently under consideration in several states.

II. The Commission Has the Authority to Impose 9-1-1 Access Obligations on 9-1-1 Operators

A. The Commission Recognized, Even Before Passage of the 9-1-1 Act, That It Had Broad Authority to Impose 9-1-1 Obligations on Telecommunications Carriers

The Commission's authority to regulate the terms on which telecommunications carriers complete 9-1-1 traffic is unquestioned. The Commission has recognized this authority since 1994, when it issued its first Notice of Proposed Rulemaking on 9-1-1 issues.[14] There, the Commission concluded that: "[O]ur proposed rules imposing uniform requirements for

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[10] *Amendment of Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12,103 ¶ 73, n.254 (2001).

[11] *See, e.g., Petitions for Waiver of the International Settlements Policy*, 13 FCC Rcd 23,924 (1998).

[12] *See Sprint Communications Co. v. FCC*, 274 F.3d 549 (D.C. Cir. 2001) (Commission order reversed for failing to evaluate impact of potential price squeeze by incumbent carriers).

[13] Testimony of NENA's First Vice President, David F. Jones, before the United States Senate Commerce, Science and Transportation Committee regarding "The VoIP Regulatory Freedom Act of 2004" (S 2281) <http://www.nena.org/ (visited June 26, 2004)>.

[14] *See 1994 9-1-1 NPRM.*

compatibility of enhanced 911 systems with wireline equipment and wireless services are consistent with our responsibilities under Section 1 of the Communications Act to promote safety of life and property."[15] By rooting its authority in Title I of the Act, the Commission followed a long tradition of promoting the health and safety of the American public.[16] Moreover, the Commission expressly recognized that the fact that most 9-1-1 calls take place within a single state's border posed no obstacle to its jurisdictional authority.[17] To the contrary, the Commission's regulatory authority extends over "[m]ixed-use services … where it is impossible or impractical to separate the service's intrastate from interstate components …."[18] 911 services – and the local equipment and facilities used to provide them – are such inseverably mixed services and, thus, unquestionably subject to federal jurisdiction.[19] Indeed, the Commission found that "it is difficult to identify a *nationwide* wire or radio communication service more immediately associated with promoting safety of life and property than 911."[20]

Based on its Title I authority, the Commission went on to impose a series of 9-1-1 obligations on the industry. For example, in another 1994 order, the Commission established rules to expand service disruption reporting requirements, including 9-1-1 reporting requirements. It also specifically rejected suggestions that the reliability and efficiency of 9-1-1 systems are not of Commission interest due to the allegedly "local" nature of the services, stating that the reliability of 9-1-1 service is "*integrally*" related to the Commission's responsibilities under the Act.[21]

The seminal 1996 Order was, likewise, based on the Commission's "health and safety" mandate under Title I as well as the analogous provisions governing wireless services in Sections 301 and 303(r) of the Communications Act.[22] In that Order the Commission promulgated rules

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[15] *1994 9-1-1 NPRM*, ¶ 59.

[16] *See 1994 9-1-1 NPRM*, ¶ 7 ("It is difficult to identify a nationwide wire or radio communication service more immediately associated with promoting safety of life and property than 9-1-1. We believe that broad availability of 9-1-1 and enhanced 9-1-1 services will best promote 'safety of life and property through the use of wire and radio communication'") (quoting 47 U.S.C. § 151).

[17] *See id.* ¶ 59; *see also The Use of N11 Codes and other Abbreviated Dialing Arrangements*, First Report and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 5572, ¶ 58 (1997) (recognizing that although most "individual [9]11 calls are likely to be intrastate … 911 ha[s] significance that go[es] beyond state boundaries") (punctuation in original altered).

[18] *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, ¶ 17 (rel. Nov. 12, 2004); *see also Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986).

[19] *1994 9-1-1 NPRM*, ¶ 59.

[20] *1994 9-1-1 NPRM*, ¶ 7 (emphasis added).

[21] *Amendment of Part 63 of the Commission's Rules to Provide for Notification by Common Carriers of Service Disruptions*, Second Report and Order, 9 FCC Rcd 3911, ¶ 35 (1994) ("*1994 Service Disruptions Order*").

[22] *Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 18676, ¶ 8

establishing nationally uniform requirements for the provision of 9-1-1 and enhanced 9-1-1 ("E-9-1-1") services, including the creation of the E-9-1-1 Phase I and Phase II deployment solutions for CMRS carriers,[23] and provisions such as 47 CFR § 20.18(d), which mandate the use of the pANI for wireless E-9-1-1 Phase I.[24] While subsequent orders expanded the statutory bases for the Commission's 9-1-1 orders,[25] the Commission never seriously questioned its authority to mandate 9-1-1 requirements.

B. Congress Has Ratified the Commission's Authority to Impose 9-1-1 Obligations on Telecommunications Carriers

On October 26, 1999, Congress passed the 9-1-1 Act,[26] which designated the number "9-1-1" as the universal emergency telephone number within the United States. In its first order implementing the mandates of the statute, the Commission required "wireline and wireless carriers … [to] make 911 available to their subscribers as the number to call in an emergency after the effective date of the designation and the end of appropriate transition periods."[27] This statute eliminated any remaining doubt that might have existed about the Commission's plenary jurisdiction over all 9-1-1 traffic, regardless of whether the calls cross state boundaries. The Commission recognized that the 9-1-1 Act would be meaningless if it did not authorize it to impose specific 9-1-1 obligations on carriers, and in the subsequent *Fifth Report and Order*, the Commission promulgated its rules obligating carriers to transmit 9-1-1 calls to Public Safety Answering Points ("PSAPs").[28] As explained further below, this Commission-developed

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(1996) ("*1996 E-9-1-1 Order*") ("One of the Commission's statutory mandates under the Communications Act is 'promoting safety of life and property through the use of wire and radio communication.' Recognizing this responsibility, the Commission has expressed increasing concern regarding the inability of wireless customers to benefit from the advanced emergency capabilities of E911 systems that are available to most wireline customers").

[23] Specific requirements are set forth throughout the *9-1-1 Order*, but are summarized by the Commission in ¶¶ 10-12. These requirements included routing of all 9-1-1 calls to appropriate PSAPs within 12 months of the order, requirements concerning disability access to 9-1-1 services, and the establishment of the Phase I and Phase II E-9-1-1 deployment solution.

[24] 47 C.F.R. § 20.18(d).

[25] For example, the *1997 Reconsideration Order* (requiring, among other things, that wireless carriers to transmit all 9-1-1 calls without regard to validation procedures and regardless of code identification) cites, without comment, sections 1, 4(i), 201, 303, 309, and 332 of the Communications Act of 1934, as amended, as the basis for its order. *See Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Memorandum Opinion and Order, 12 FCC Rcd 22665, ¶ 151 (1997) ("*1997 Reconsideration Order*").

[26] Wireless Communications and Public Safety Act of 1999, Pub. L. No. 106-81 (1999) ("9-1-1 Act").

[27] *See Implementation of 911 Act (The Use of N11 Codes and Other Abbreviated Dialing Arrangements)*, Fourth Report and Order and Third Notice of Proposed Rulemaking, 15 FCC Rcd 17079, ¶ 11 (2000).

[28] *Implementation of 911 Act (The Use of N11 Codes and Other Abbreviated Dialing Arrangements)*, Memorandum Opinion and Order on Reconsideration, Fifth Report and Order, and First

obligation is explicit and unequivocal. It is not limited by where such 9-1-1 calls originate, whether from ILEC customers, CLEC customers, CMRS customers, VoIP providers, or otherwise. It states that *all* telecommunications carriers must provide such transmission, and that *all* 9-1-1 calls must be so routed.

In 2004, with passage of the "Enhance 911 Act,"[29] the Commission's express authority over 9-1-1 service was further clarified. Among other things, the Enhance 911 Act states Congress' intent that, "for the sake of our Nation's homeland security and public safety, a universal emergency telephone number (911) that is enhanced with the most modern and state-of-the-art telecommunications capabilities possible should be available to all citizens in all regions of the Nation."[30] This provision expresses Congress' clear intent that the Commission be empowered to undertake those actions necessary to provide all citizens with E-9-1-1 service.

Finally, Vonage notes that the Commission *presumed* its broad authority over VoIP 9-1-1 issues in its *NPRM* initiating this proceeding.[31] There the FCC has asked for comment on the difficult questions associated with VoIP, including whether VoIP providers should be required to provide 9-1-1 and enhanced 9-1-1 services. In particular, the FCC asked parties to develop a record so that it could balance various regulatory objectives associated with 9-1-1 services.[32]

C. The Regulatory Classification of Vonage's Service is Irrelevant

Even if the Commission were to determine (correctly) that Vonage's service qualifies as an "information service" under the Act, 47 U.S.C. § 153(20), that finding would have no bearing on its authority to require ILECs to offer direct 9-1-1 access to all VoIP providers. The Commission has clear jurisdiction over *all* traffic delivered to 9-1-1 operators regardless of its source. Indeed, nothing in any of the orders cited above indicates that only end user customers of carriers may place 9-1-1 calls. While it is certainly true that the earlier 9-1-1 orders did not contemplate VoIP, that cannot determine whether the Commission has the authority to prospectively require an ILEC to provision 9-1-1 elements to VoIP providers, or for that matter to any other entity that may request them to enable emergency services for its users.

The Commission has a long history in other contexts of requiring carriers to provide access to their networks on a non-discriminatory basis, regardless of whether the entity seeking access is a "carrier" or an "end-user" for regulatory purposes. As one court has observed, the

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Report and Order, 16 FCC Rcd 22264 (2001) Appendix B, as codified at 47 C.F.R. § 64.3001 (emphasis added).

[29] Ensuring Needed Help Arrives Near Callers Employing 911 Act of 2004, Pub. L. No. 108-494 (2004) ("Enhance 911 Act").

[30] Enhance 911 Act, § 102(1), codified at 47 U.S.C. § 942 note.

[31] *See IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, ¶¶ 51-57 (2004) ("*IP-Enabled Services NPRM*").

[32] *IP-Enabled Services NPRM*, ¶ 53.

Commission has effectively "obliterated … [the] traditional regulatory lines between 'carriers' and ''customers.'" *Global Access v. AT&T*, 978 F. Supp. 1068, 1074 (SD Fla. 1997).

Thus, in the early *Resale and Shared Use* proceeding, which first opened U.S. communications markets up to competition, the Commission rejected arguments by AT&T that competitive communications providers should be barred from subscribing to offerings intended for end-users.[33] Applying the same principles, the Commission also found that end-users should be permitted to purchase carrier services for their own use without holding themselves out as carriers.[34]

Likewise, in the *Expanded Interconnection* proceedings, the Commission cited its long-standing "policy of not distinguishing between carriers and end users" in mandating that expanded interconnection for special access "be made available to all parties who wish to terminate their own special access transmission facilities at LEC central offices, including CAPs, IXCs, *and end users*."[35] The Commission grounded its authority for imposing these requirements in Sections 201(a), as well as Sections 1 and 4(i) of the Act – the very provisions the Commission has cited in its 9-1-1 orders.[36] Reading Section 201(a) as mandating interconnection only between carriers, the Commission found, would ignore the anti-discrimination provisions of Section 202, and that it would, therefore, be unreasonable to permit "differences in service rates and terms that are predicated upon the type of customer involved."[37] The Commission also found the Title I provisions relevant because expanded interconnection for carriers *and* end-users promoted the development of "a rapid, efficient, Nation-wide and world-wide wire and radio communication service,"[38] and that the Commission had ample authority under Section 4(i) to take actions necessary to promote those objectives.

These same statutory provisions support the imposition of the 9-1-1 access that Vonage seeks. It would be absurd to believe that VoIP customers have any less interest in receiving the services of emergency service providers than do customers of traditional PSTN telephone

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[33] *See Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, 60 FCC 2d 261 (1976) (services offered to end users must also be available to resellers).

[34] *Petition of First Data Resources, Inc., Regarding the Availability of Feature Group B Access Service to End Users*, Memorandum Opinion and Order, 1986 WL 291786, ¶ 13 (1986) ("interstate access services should be made available on a non-discriminatory basis and, as far as possible, without distinction between end user and IC customers") (citing 47 U.S.C. §§ 201 and 202).

[35] *Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369, ¶ 65 (internal citation omitted) (emphasis added), *modified on recon.*, 8 FCC Rcd 127 (1992), *further modified on recon.*, FCC 93-378 (released Sept. 2, 1993), *vacated in part on other grounds, Bell Atlantic v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994).

[36] *Expanded Interconnection with Local Telephone Company Facilities*, 9 FCC Rcd 5154, ¶¶ 18-19 (1994), *remanded for consideration of 1996 Act, Pacific Bell v. FCC*, 81 F.3d 1147 (D. C. Cir. 1996).

[37] *Id*. ¶ 19.

[38] *Id*. ¶ 20 (quoting 47 U.S.C. § 151).

companies. Because it is in the public interest to provide that access, long-standing Commission precedent provides it with the authority to mandate that VoIP providers – who, if classified as information service providers, constitute end-users – receive that access.

D. The Commission Has Ancillary Jurisdiction to Mandate 9-1-1 Access For VoIP Providers

It is clear that the Commission has the necessary ancillary authority under Title I to impose this relief. Title I authorizes the "[t]he Commission [to] … perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Chapter, as may be necessary in the execution of its functions."[39] This grant of authority "endows the Commission with sufficiently elastic powers such that it may readily accommodate dynamic new developments in the field of communications,"[40] and "may be employed, in the Commission's discretion, where the Commission's general jurisdictional grant in Title I of the Communications Act covers the subject of the regulation and the assertion of jurisdiction is 'reasonably ancillary to the effective performance of [its] various responsibilities.'"[41] To be sure, the Commission's exercise of Title I authority must be reasonably related to a specific responsibility imposed on the Commission elsewhere in the statute,[42] but this requirement is amply satisfied here. First, the Commission plainly has Title II jurisdiction over the 9-1-1 operators (who, as noted previously, are almost exclusively incumbent LECs) because they are providing "telecommunications" to the PSAPs. Second, the Commission's explicit § 251(e)(3) jurisdiction over 9-1-1 service trumps any jurisdictional limitations that would otherwise apply. The relief that Vonage is seeking here is plainly related to these explicit grants of statutory jurisdiction, and therefore within the agency's Title I authority. Further, as shown below, it is necessary to achieve policy goals expressed in the statutory language.

1. Lack of Direct Access to 9-1-1 Infrastructure Affects Health, Safety and Property.

The Commission has broad authority to impose public safety requirements on interstate wire communications. These public safety capabilities are an important and beneficial part of the communications system. As explained above, the Commission has premised much of the 9-1-1 obligations it has imposed on telecommunications carriers on these considerations.

The Commission's authority derives not only from the fact that regulated telecommunications carriers control key parts of the emergency response infrastructure, but from Congress' finding that "emerging technologies can be a critical component of the end-to-end

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[39] 47 U.S.C. § 154(i).

[40] *General Telephone Company of the Southwest v. United States*, 449 F.2d 846, 853 (5th Cir. 1971).

[41] *Digital Broadcast Content Protection*, 18 FCC Rcd 23550, ¶ 29 (2003) (*quoting United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (punctuation altered)).

[42] *See, e.g., FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979); *Motion Picture Ass'n of America v. FCC*, 309 F.3d 796 (D.C. Cir. 2002).

communications infrastructure connecting the public with [emergency services.]"[43] Denying 9-1-1 access to end-user VoIP providers or those who happen to be customers of VoIP providers threatens that Congressional policy by isolating VoIP users from this end-to-end communications infrastructure.

Further, the refusal of ILECs to provision *complete* VoIP 9-1-1 access threatens the development of new capabilities and functions that will greatly enhance the delivery of emergency services. As the Commission recognized in the *IP-Enabled Services* NPRM, the advent of IP-Enabled services has the potential both to improve existing technology and reduce costs associated with the delivery of emergency services.[44] Additionally, an IP-based E-9-1-1 infrastructure would improve interoperability among public safety entities.[45] As Commissioner Adelstein recognized, "IP-enabled services provide an opportunity for technological improvements that may enhance the capabilities of PSAPs and first responders[,]"[46] resulting in the promotion of public safety by providing information that cannot be conveyed by the existing emergency services system. While today Vonage only seeks 9-1-1 access comparable to that enjoyed by traditional LECs and CMRS carriers, such access is only the first step in developing the feature-rich IP Enabled 9-1-1 service of the future.[47]

2. Lack of VoIP Provider 9-1-1 Access Suppresses Price and Service Competition, Broadband Adoption, and the Promotion of Rapid, Efficient, Nationwide and World-Wide Wire Communications Services.

The Commission has long recognized that one of the most crucial responsibilities delegated it by Congress is to promote innovation and competition for information services by seeking to assure that consumers are able to access the service providers, applications and content of their choice. Thus, as part of its organic statute, the Commission must: promote the

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[43] 9-1-1 Act § 2(a)(3), codified at 47 U.S.C. § 615 note.

[44] *See IP-Enabled Services*, ¶ 53.

[45] *See id*.

[46] Remarks of Commissioner Jonathan S. Adelstein at the Federal Communications Commission Solutions Summit, "911/E911 Issues Associated with Internet-based Communications Services" (Mar. 18, 2004).

[47] Transitioning to an IP-based E-9-1-1 infrastructure will vastly improve upon the capabilities of the existing emergency call infrastructure. By leveraging the power of the Internet, first responders can have access to medical histories, blueprints to identify locations within a building where people may be located, and other critical data that can be made digitally available to first responders in real time. As one commenter has explained, an IP-based E-9-1-1 infrastructure is more resilient, sets up calls faster, better supports subscribers with hearing disabilities, adds multimedia information to better direct resources, allows competition for elements of the network infrastructure, conveys more call-associated data and allows more cost-effective PSAP technology. *See* Dr. Henning Schulzrinne, 9-1-1 Calls for Voice-over-IP, at 2-5 (Feb. 28, 2003) (Ex Parte filing in *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, IB Docket No. 99-67, Further Notice of Proposed Rulemaking, 17 FCC Rcd 25576 (2002)).

availability of a rapid, efficient, nationwide and reasonably-priced communication system;[48] encourage the deployment of advanced telecommunications capability to all Americans;[49] encourage the provision of new technologies and services to the public;[50] promote the continued development of the Internet and other interactive computer services;[51] and promote competition to secure lower prices and higher quality services for American telecommunications consumers.[52] Mandating VoIP 9-1-1 access to ILEC 9-1-1 selective routers and ALI steering and other elements promotes each of these national objectives.

Today's Internet owes much to the Commission's prescient decision a quarter-century ago in *Computer II* to exercise its Title I authority to prohibit telecommunications companies from discriminating in favor of their own information services. But as discussed above, carrier policies that deny VoIP providers the ability to obtain directly 9-1-1 access can only be rationally explained as anti-competitive attempts to keep third-party VoIP providers, who constitute a growing source of competition, out of the market. Commissioner Abernathy recently expressed optimism that VoIP "is increasingly creating the robust, facilities-based voice competition that the framers of the 1996 Act envisioned."[53] The Commission has increasingly encouraged the development of alternative platforms and technologies to stimulate the competition envisioned by the 1996 Act. However, if this path toward competition is to fully develop, the Commission must prohibit 9-1-1 operators from denying VoIP providers necessary 9-1-1 access. Just as the Commission recently sanctioned Madison River Communications for blocking Vonage's service, the Commission must make clear that the appropriate response to a competitive threat is to compete legitimately in the marketplace, not to block customers' access to the competitor.

Requiring nondiscriminatory 9-1-1 access also will encourage the deployment of advanced telecommunications capability to all Americans. It is widely recognized that two of the most important factors that could stimulate broadband penetration in the United States are the emergence of "killer" broadband applications and a reduction in broadband prices. By enabling consumers to purchase VoIP instead of the circuit-switched service of an ISP's telco affiliate, the Commission would achieve both – but not if consumers are deterred from subscribing because of impediments to full 9-1-1 service. Vonage's full-service VoIP products work only with always-on broadband connections; thus, the enhanced functionalities and competitive prices offered by VoIP attract new customers to broadband.[54] In addition, when consumers are able to factor into

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[48] 47 U.S.C. § 151.

[49] Telecommunications Act of 1996, § 706.

[50] 47 U.S.C. § 157(a).

[51] 47 U.S.C. § 230.

[52] Telecommunications Act of 1996, preamble.

[53] *See* Remarks of Commissioner Kathleen Q. Abernathy, "Overview of the Road to Convergence: New Realities Collide with Old Rules," January 22, 2004, at 1.

[54] *See, e.g.,* Remarks of Commissioner Kathleen Q. Abernathy, "Overview of the Road to Convergence" at 2 ("Hopefully, VOIP is the 'killer app' we have all been awaiting to bolster marketplace incentives to build out broadband facilities to all Americans").

the broadband purchasing equation significant savings on voice services, the net price of broadband decreases dramatically, stimulating more aggressive competition by traditional carriers.

Finally, the 9-1-1 relief will further the statutory goal of promoting competition and preventing monopolization. The Commission has repeatedly recognized that where dominant firms control bottleneck "facilities that … rivals need to compete," regulation is necessary to ensure that vibrant retail competition can emerge.[55] This is especially true when incumbent 9-1-1 operators deny competing VoIP providers access, which effectively "discriminates against rivals … by making these rivals' offerings less attractive."[56]

The Commission should therefore reaffirm its long-standing commitment under Title I to prohibit vertically-integrated infrastructure providers from using their leverage to block consumer access to third-party information services, such as by blocking access to the 9-1-1 facilities that VoIP providers need.

Conclusion

As we have previously explained, Vonage supports the Commission's goal of assuring all VoIP users access to 9-1-1 emergency response services, as a critical step towards protecting public health and safety. If Vonage and other VoIP providers are going to be subject to a Government mandate to provide this service, however, it is only fair and reasonable that we also have access to the facilities needed to complete these calls (and adequate time to implement that access). The Commission has ample authority to compel this access, and ample policy justification to exercise that authority. We respectfully urge you to ensure that VoIP providers will have access, on reasonable and non-discriminatory terms, to the same services and facilities that 9-1-1 operators offer to CMRS carriers and others.

Sincerely,

/s/
William B. Wilhelm, Jr.

Counsel for Vonage Holdings Corp.

cc: Commissioner Kathleen Abernathy
Commissioner Jonathan Adelstein
Commissioner Michael Copps

[55] *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934,* 11 FCC Rcd 21905, ¶ 11 (1996).

[56] *Id.*

Dan Gonzalez
Thomas Navin
Marlene Dortch, Secretary

Appendix

Vonage is deeply concerned about artificial obstacles being erected to prevent Vonage from offering 9-1-1 service, as well as formal barriers pending in legislation being championed by some Bell companies—who, in 49 out of 50 states, control the telecommunications infrastructure used to deliver 9-1-1 calls to the Public Safety Answering Points, or PSAPs. As we will show below, many of the requirements imposed by these laws ignore the technical obstacles faced by Vonage, and would create competitive inequities that would have a significant impact on interstate commerce and would potentially be devastating to competitive VoIP providers not affiliated with an incumbent local telephone company.

I. Kansas Legislation (passed)

On April 28, 2005, the Kansas Legislature passed a bill (HB 2026) that requires providers of Voice over Internet Protocol ("VoIP") services to direct emergency service calls to local public safety answering points ("PSAPs"). The bill is now before the Governor for his signature or other action.

The bill requires that VoIP providers must "direct to the appropriate PSAP dispatcher any emergency 911 call made by users of its VoIP service." "VoIP Provider" is expansively defined as "any provider of [VoIP] service … other than a business which: (A) does not provide such service to customers outside its business organization; or (B) provides VoIP service as a customer product secondary to the primary product sold by the business."

Although the bill imposes an obligation on VoIP providers, it does not give them the tools to meet this mandate. The bill does not impose any obligation on the local telephone companies to permit interconnection or to provide any other services needed by the VoIP providers to route their emergency calls. It is conceivable, therefore, that this statute could result in Vonage and similar providers being prohibited from offering their services in Kansas, because they would be technically unable to comply with the statutory duty. The bill does not specify how the 9-1-1 requirement is to be enforced or any penalties for violations; thus, providers would be subject to potentially unknown consequences if they continued to market their services in Kansas without full E-9-1-1 capabilities.

Moreover, as explained above, Vonage customers can access their VoIP services from any compatible broadband Internet connection. Nomadic users may, for example, connect to the service from a hotel room or a public "hot-spot" that offers an Internet connection. If such a user accessed the service while in Kansas, Vonage could possibly be in violation of this proposed statute without even knowing it.

Also, the exemption for a "secondary" VoIP "product" could be interpreted to exempt from the statute any VoIP service offered by a company, such as SBC, that primarily offers wireline telephone service (or, for that matter, any other Internet service provider that chose to offer VoIP as a "secondary" service to its users). This would create a competitive dichotomy between companies that offer VoIP as an add-on to other services and companies like Vonage that market stand-alone VoIP offerings. It is unknown to us why the Kansas Legislature has passed a bill that would so inequitably promote one group of companies over another, when the

public interest in providing rapid emergency response ought to be the same in both cases; nonetheless, the potential impacts of this requirement on interstate commerce are clear.

II. Illinois Legislation (pending)

The Illinois Legislature is currently considering a bill (SB 1447) that could require providers of Voice over Internet Protocol ("VoIP") services to direct emergency service calls made in the state to appropriate local public safety answering points ("PSAPs") with automatic location and telephone number. The bill requires that, on and after September 1, 2005, each VoIP provider must automatically forward to the appropriate 9-1-1 system the telephone number and physical location from which each 9-1-1 call is made through the VoIP service. The Senate is scheduled to consider this bill on May 31, 2005.

The bill broadly defines VoIP as "a service that provides features, functions, or protocols that allow end users to originate and receive Internet Protocol-enabled voice services that resemble the characteristics of traditional circuit switched voice telecommunications services."

Providers seeking a single extension of up to one year must demonstrate that compliance with the 9-1-1 provisions are not technically feasible or are unduly economically burdensome. A provider must also certify that during the extension period it will either (1) advertise and disclose clearly and conspicuously that 9-1-1 service may be unavailable or inadequate when using the VoIP service, or (2) obtain a separate, signed acknowledgment, in a form approved by the Illinois Commerce Commission, from each of its customers and subscribers in Illinois stating that the customer or subscriber is aware that 9-1-1 service may be unavailable or inadequate.

The bill provides that anyone that violates the Emergency Telephone System Act commits an "unlawful practice" under the Illinois Consumer Fraud and Deceptive Business Practices Act. The proposed law would also make it unlawful to represent that a VoIP service has characteristics that it does not in fact have, including the capability or functionality to make or place calls to 9-1-1 that will be answered in the manner required (including with automatic telephone number and physical location information) by the Emergency Telephone System Act. Any entity that violates the 9-1-1 provisions commits a "business offense" for which the ICC may impose a fine of not less than $1,000 and not more than $5,000. The bill would also establish a presumption that any entity violating the 9-1-1 provisions would be liable for penalties under the Emergency Telephone System Act, and could face other legal sanctions under the state's consumer protection laws for failure to adequately notify customers of 9-1-1 limitations.

As drafted, the amendment would establish significant obligations for VoIP providers in Illinois. Significantly, however, the bill does not provide any recourse for VoIP providers if they are denied interconnection to local telephone company facilities, or other resources controlled by those companies that are essential to provision of emergency services. Thus, as in Kansas, the proposed legislation would effectively turn Vonage and other non-interconnected VoIP providers into second-class competitors. Indeed, the Illinois bill would go further, by both failing to assure VoIP providers of interconnection to local telephone company networks, and then requiring the providers to advertise that lack of interconnection. Taken together, these provisions can only operate to protect and promote the competitive interests of local telephone companies.

III. Texas Legislation (pending)

The Texas Legislature is currently considering a bill that could significantly affect the rights of interconnection in that state. Texas House Bill 789, which has been approved by the Texas House of Representatives, and which is now under consideration by the Senate, will allow interconnection between regulated providers of telecommunications services and non-certificated providers of VoIP services, but *only* those VoIP providers that own or control wireline network facilities. "Interconnection" includes the direct trunk connections to the Selective Routers that Vonage needs to provide E-9-1-1 capabilities.

Section 60.129 of the bill provides that the Texas PUC shall adopt rules applicable to all "interconnecting entities" to ensure that, among other services, E-9-1-1 systems are "efficient and secure for consumers." Although the bill does not define "interconnecting entities," a reasonable interpretation may be made that they would be defined under section 51.002(11) of the bill, as a "network provider." A "network provider" is "an entity, whether or not certificated … and that uses any technology to offer voice communication to the public *over a wireline network that the provider or an affiliate of the provider owns or controls*."

According to this interpretation, the bill discriminates between those VoIP providers that own or operate (directly or through an affiliate) a wireline network and those that do not. The bill would provide the right of interconnection for purposes of establishing E-9-1-1 service to a non-certificated VoIP provider that owns or operates a wireline network, but deny that right to non-facilities-based VoIP providers. Under this interpretation, cable companies or affiliates of incumbent carriers (such as SBC information service entities) would be granted the right of interconnection for purposes of E-9-1-1 service, but Vonage and other non-facilities-based providers would not.

In addition, Section 64.006 of the bill imposes the following conditions on all VoIP providers:

> (b) VoIP provider may not enter into a contract to provide VoIP service unless the entity provides clear and conspicuous notice to customers disclosing whether or not the service provides access to E-911.
>
> (c) A VoIP provider which does not provide access to E-911 or which requires a customer to take steps to activate access to E-911 may not enter into a contract to provide VoIP service unless the VoIP provider provides clear and conspicuous notice of the following:
>
> (1) the specific steps the customer must take to activate that service; and
>
> (2) an explanation of all material differences between E-911 service and the provider's system for accessing emergency services.

(d) The notice required by Subsection (c) must:

(1) be a separate document; and

(2) conspicuously state that the customer acknowledges that the customer will not be able to use the service to access E-911, or that the customer must separately activate access to that service in order to receive it.

(e) At least annually, a VoIP provider shall send to each customer to whom it provides VoIP service a notice that includes the information required by Subsection (c). The entity shall provide the notice as a separate document.

In combination, these provisions would place Vonage and similarly-situated providers at a distinct competitive disadvantage. VoIP providers affiliated with a wireline network provider, such as SBC (or AT&T, after SBC finishes acquiring it) or any other traditional telephone company would be able to obtain interconnection needed to provide E-9-1-1, while non-facilities based providers not only would not have these interconnection rights, but would be required to make "conspicuous" disclosures to consumers of the resulting impairment of their service.

IV. Michigan Legislation (proposed)

On April 28, 2005, the Michigan Public Service Commission closed a year-long investigation into the provision of VoIP services. In its investigation, the Commission sought comments on, among other topics, the number and type of VoIP providers in Michigan, the proper degree of regulation, information regarding the effect of VoIP on telephone numbering resources, access to the emergency services network, and universal service obligations.

Although the Commission did not make any final determinations on many of the subjects it studied, the order closing investigation explicitly requested that the Michigan Legislature amend the state's telecommunications laws to provide the Commission the ability to "assess the effect of [VoIP] service on Michigan's citizens, to adopt non-intrusive registration and certification mechanisms by which customer complaints regarding voice communication services may be forwarded to the appropriate companies, and to ensure that all citizens of this state have the benefit of enhanced 9-1-1 services."

The Commission's order also provided that "[t]he Commission shall support efforts to include [VoIP] providers in the definition of 'service supplier' in the Emergency Telephone Service Enabling Act." Should this occur, VoIP providers would be required, among other things, to provide location and call-back information for their users. Under Michigan's Emergency Telephone Service Act ("ETSA"),[1] each county or other political district (based on population) must develop a 9-1-1 Service Plan applicable to "service suppliers."[2] Although each

[1] MICH. COMP. LAWS § 484.1101 *et seq.*

[2] Under the ETSA, "Service supplier" means "a person providing a telephone service or a CMRS [commercial mobile radio service] to a service user in this state." MICH. COMP. LAWS § 484.1102(bb)

county's 9-1-1 Service Plan will differ, the ETSA establishes the following minimal duties for "service suppliers" generally:

1. ALI and ANI database information;
2. Tariff filings for 9-1-1 service rates; and
3. Billing and collection of 9-1-1 surcharges.

The ETSA defines "Universal emergency number service" or "9-1-1 service" as "public telephone service that provides service users with the ability to reach a public safety answering point by dialing the digits "9-1-1."[3] It also defines ALI and ANI as "*9-1-1 service features offered by service suppliers*."[4] Although vague on whether all service suppliers must provide ALI and ANI services, the statute seems to imply that such functions are considered components of "9-1-1 service," which service suppliers are be required to provide under the district 9-1-1 service plans.

The ETSA clearly dictates that service suppliers must "provide to 9-1-1 database service providers accurate database information, including the name, service address, and telephone number of each user, in a format established and distributed by that database service provider."[5] The information must be provided to the 9-1-1 database service provider within the following time periods:

(a) Within 1 business day after the initiation of service or the processing of a service order change.
(b) Within 1 business day after receiving database information from a service supplier or service district.

Although classifying VoIP providers as "service suppliers" under ETSA would subject them to these (and other) duties, it would not appear to give them any right to obtain interconnection to local telephone company networks for the performance of these duties. Without such interconnection, it would be technically impossible for Vonage to comply fully with the ETSA requirements.

Thus, if the Commission's proposal were adopted as law, Vonage and similarly situated providers would, as in Kansas, face the prospect of being in violation of law due to inherent technical limitations of their services, and of being unable to prevent such violations due to the nomadic attributes of the technology.

V. New York Legislation (proposed)

The New York State Assembly is expected to hold committee hearings shortly on bill A.7932, introduced by Assemblymen Brodsky and Koon. This bill would require all VoIP providers to notify consumers, "both before service commencement and during service

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[3] MICH. COMP. LAWS § 484.1102(gg).

[4] MICH. COMP. LAWS § 484.1102(a) & (b) (emphasis added).

[5] MICH. COMP. LAWS § 484.1316.

provision, regarding any limitations associated with their basic or enhanced 911 service, and whether such service is basic 911 service or enhanced 911 service." Providers would have to "secure consumers' express acknowledgement that they are aware of any limitations upon basic or enhanced 911 services," and to "provide on-going consumer notification during service provision, … by issuing warning stickers to be affixed to telephone sets, routers, and advanced technology attachments (ATAs), through any subsequent advertising, and in billing inserts."

Further, VoIP providers would be required to "use all reasonable efforts to prevent basic or enhanced 911 calls from foreign exchange VoIP consumers from being routed to the wrong PSAP."

Although, unlike some of the other legislation discussed above, this bill recognizes the inherent technical limitations on VoIP service and does not impose criminal or civil penalties for failing to do the impossible, it also does not entitle VoIP providers to interconnect with local telephone company networks. It also requires VoIP providers to go to extreme lengths to advertise the consequences of any lack of interconnection, in terms of "limitations" upon 9-1-1 calling. Thus, local telephone companies would actually have an increased incentive to refuse to interconnect with VoIP providers, knowing that this refusal would trigger an obligation for those providers to give affirmative notice to consumers of service limitations.